

Dissenting Views to H.R. 3215,
the “Combating Illegal Gambling Reform and Modernization Act”

Although we are opposed to illegal gambling, whether done over the Internet or otherwise, we cannot support the legislation reported by the Judiciary Committee because the enforcement mechanisms will likely be ineffective. We question the wisdom of spending valuable prosecutorial resources on attempting to shut down Internet gambling sites – an endeavor which ultimately is likely to be futile.

H.R. 3215 would make it unlawful for a person engaged in a gambling business knowingly to use a communication facility¹ to transmit a bet, wager, or information assisting in the placing of bets or wagers.² The bill also makes it unlawful for a person engaged in a gambling business knowingly to accept, with respect to the transmission of bets or wagers, credit, electronic fund transfers, checks and other similar financial instruments.³ By prohibiting the payment of credit, electronic funds, checks and other similar instruments to Internet gambling businesses, H.R. 3215 deputizes the financial services industry to be the primary enforcers of the law.

In order to ensure compliance, the bill authorizes law enforcement to obtain injunctive or declaratory relief to restrain or prevent any person from paying or assisting in the payment of bets or wagers in interstate commerce.⁴ Such relief, when granted against an interactive computer service, is limited to the removal of, or disabling of access to, an online site violating the law or a hypertext link to an online site violating the law, that resides on a computer server that such service controls or operates.⁵

The version of H.R. 3215 that the Committee initially considered would have created an unfair situation in which Internet betting was legal for certain types of gambling (horse racing, fantasy sports, state lotteries, and casino gambling⁶), but illegal for other types of Internet

¹The term “communication facility” means any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission. 18 U.S.C. § 1081.

²H.R. 3215, subsection (a).

³H.R. 3215, subsection (b).

⁴H.R. 3215, subsection (i)(1).

⁵H.R. 3215, subsection (i)(3)(A).

⁶Such wagering was legal if both the bettor and the gambling business were located in a State that had explicitly authorized such bets or wagers.

gambling (dog racing, jai alai, charitable gaming, and Tribal gambling⁷). At markup, however, the Committee adopted an amendment offered by Rep. Cannon that outlawed *all* interstate Internet gambling, thereby eliminating the bill's preferences for certain types of gambling interests.⁸

Credit card companies such as Visa and Master Card have raised concerns with the bill because it could subject them to injunctions in numerous jurisdictions that require different – or even conflicting – remedies to prevent the payment of Internet bets or wagers. The result will be a hodge-podge of inconsistent court orders, rather than a cohesive enforcement scheme.

In addition, relying on financial institutions to enforce the law will likely be ineffective. Credit card companies have a limited ability to block financial transactions to illegal Internet gambling businesses. The companies rely on a merchant coding system to ascertain the nature of particular transactions, but this system has limitations. First, it depends on the merchant to accurately code a transaction. There are obvious incentives for many Internet gambling merchants to falsify their merchant identification.⁹

More significantly, the coding system applies only when an online gambler uses a credit card to transact business directly with an online gambling merchant. Often times, an Internet gambler will use electronic cash and account funding systems to create a pool of electronically available funds. Thus, a cardholder could use his or her credit card to purchase “e-cash” on a web site that does not, itself, offer gambling, but allows that e-cash to be used on another web site that does offer gambling. The credit card coding system would not capture these transactions as

⁷The bill's requirement that the player physically be present on Indian lands had the practical effect of prohibiting Tribal gaming because no potential customer would travel to an Indian reservation in order to access the Internet to make a transaction on a Tribal Internet gaming site.

⁸The Committee adopted the Cannon Amendment after Rep. Wexler failed to prevail on an amendment that would have permitted Internet gambling on dog racing and jai alai.

Although the bill treats all *interstate* Internet gambling equally, we are nevertheless concerned with the bill's overly restrictive treatment of Indian tribal governments with respect to *intrastate* Internet gambling. Except for prohibiting state lotteries, the bill does not address the ability of states to authorize Internet gambling on an *intrastate* basis. Thus, states are still empowered to license Internet gaming sites that could offer wagering opportunities to anyone within that state who is legally eligible to place a wager. However, the bill limits the ability of tribes to take wagers by requiring that the individuals physically be located on reservation lands. Congress should not be in the practice of picking winners and losers when establishing public policy.

⁹Testimony of Mark MacCarthy, Senior Vice President of Public Policy, Visa U.S.A., Inc., before the Subcommittee on Oversight and Investigations of the Committee on Financial Services, 107th Congress, 2nd Sess. (July 12, 2001).

Internet gambling.¹⁰ And if the e-cash website is offshore, it could be beyond the reach of U.S. law enforcement.

Additionally, the bill does not make it illegal for an individual to place an Internet bet. Rather, the bill only criminalizes an Internet gambling *business* which accepts bets or wagers or accepts credit or other types of financial instruments. As such, the bill leaves out the most effective enforcement mechanism – targeting individual bettors. This legislation, therefore, has little or no deterrent value. Offshore gambling sites will evade any restrictions easily, and individual bettors will continue to seek out these sites and gamble free from any fear of any legal consequences.

Conclusion

Although the intent of this legislation is laudable, we believe conscripting credit card companies to enforce our criminal laws is ineffective and will set a bad precedent regarding the Internet. In addition, criminalizing only the Internet gambling business without placing any penalty on the individual bettor further weakens the enforcement scheme of the bill. In the end, it is unlikely that this legislation will successfully halt Internet gambling.

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¹⁰*Id.*